Best Practices for Institutions in Mediating Appeals

under the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*

A Joint Project of the

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and the

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Introduction

Based on over 15 years of experience in mediating appeals under the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* (the *Acts*), it is the view of the Information and Privacy Commissioner/Ontario (IPC) that mediation can be applied to the full range of issues raised in an appeal: exemptions, existence of records, jurisdiction, and procedural matters.

We are proud that the majority of appeals are fully resolved without the need for a formal adjudication and order. Even when appeals are not fully resolved, the majority are resolved in part, meaning that fewer issues and/or records proceed to the adjudication stage.

Nevertheless, there is always room for improvement. For a variety of reasons that will be outlined in the body of this paper, we are changing the way we do mediation at the IPC. The purpose of this *Best Practices* paper is to set out what we believe is a revitalized mediation process that will increase the parties' satisfaction, foster positive relationships and produce even better and more timely results.

The IPC and the Freedom of Information (FOI) Unit of the Ministry of the Attorney General (MAG) developed these *Best Practices* based on our work in a joint pilot project aimed at enhancing both the opportunities for, and results of, mediation. Together we changed the mediation model and process to a more interactive one, using face-to-face mediation and teleconferencing. The success stories discussed in this paper serve to illustrate the benefits of this new approach.

Finally, while the focus of this paper is the mediation of appeals, many of these *Best Practices* can also be adapted and applied to privacy complaints.

What is Mediation?

Simply defined, mediation is negotiation between parties that is assisted by a neutral third party. Mediation is a process designed to assist the parties in reaching their own, mutually acceptable resolution to the issue(s) in dispute.

Mediation is the preferred method of dispute resolution at the IPC.

In Ontario, we are fortunate that the ability to resolve appeals through mediation is addressed directly in the statutes:

> The Commissioner may authorize a mediator to investigate the circumstances of an appeal and to try to effect a settlement of the matter under appeal. [section 40 of the municipal *Act* and section 51 of the provincial *Act*]

What are the key challenges to mediation in an FOI context?

Even though mediation has been a successful dispute resolution method, IPC mediators face a number of unique challenges:

- Historically, we used a "shuttle mediation" model whereby the mediator would communicate separately (by telephone and/or in writing) with the Information and Privacy Co-ordinator (the Co-ordinator) and the appellant, going back and forth until the appeal was either resolved in whole or in part, or required adjudication.

  We have since learned we can accommodate both a rights-based (the law) and interest-based (principles, culture, values and needs) model, and that a process based on "shuttle mediation," while perhaps suitable for certain appeals, is unnecessary in most cases. It is also less effective in producing some of the key benefits of a more interactive mediation model in which the parties have an opportunity to discuss issues and resolve them together in face-to-face discussions or by teleconference.

  Despite our extensive promotion of a more interactive model in both our written products and on an individual file basis, there is a general reluctance amongst many institutions to depart from the status quo and move to a more interactive mediation model.

- Institutions' reliance on a rights-based approach in which they believe their decisions are based on the law and are therefore "correct," resulting in an unwillingness to "think outside the box" and pursue other options.

- Institutions hold all of the information – the records to which access has been denied – relevant to the issues in dispute.

- The institution's "mediation representative" is often not the person who has a detailed knowledge of the records at issue in the appeal, nor – and perhaps more importantly – the person who has the authority to bind the institution during mediation discussions.

  In most provincial institutions and in many municipal institutions the Co-ordinator is not the delegated decision maker, yet is the institution's mediation representative. Obtaining approval for mediation proposals is too often a time-consuming process yielding unsatisfactory results and requiring repeated forays up the chain of command. An unfortunate result of this delay is that the passage of time often lessens the incentive for settlement and increases the appellant's mistrust of government.

What have we done to address these challenges?

At the IPC we have undertaken a number of initiatives to encourage institutions to participate in a more interactive mediation model that brings the parties together directly to discuss and resolve issues. For example, we hold semi-annual special meetings for municipal and provincial Co-ordinators promoting mediation; our e-newsletter *Mediation Works!* and *IPC Perspectives* include mediation success stories, which highlight the benefits of face-to-face mediation and teleconferencing; and individual mediators encourage and promote bringing the parties together on a case-by-case basis.

Perhaps the most important initiative aimed at addressing these challenges began in 2001 with the joint pilot project with MAG entitled the *Enhanced Mediation Pilot Project*.

The *Enhanced Mediation Pilot Project*

The IPC approached MAG with an idea for a joint pilot project aimed at improving the success rate in mediating appeals. MAG enthusiastically embraced the idea, as the proposed project was very much in keeping with its support for alternative dispute resolution.

We agreed that our mutual goal of improving the mediation success rate could be met by addressing the challenges associated with mediating in the FOI context; in particular, we focused on developing a more interactive mediation model and entrenching a commitment to mediation.

We developed an agreed upon protocol, the key elements of which are:

- Defining "enhanced mediation" as

> mediation in which a Ministry Mediation Representative (a senior ministry person who, if not the decision-maker, has quick access to the decision maker for consultation regarding settlement) participates in early mediation initiatives with the appellant, a ministry FOI Office designate and the IPC mediator, either in person or by teleconference.

and

- Committing to the enhanced mediation process through:
  - a non-adversarial attitude;
  - a recognition that decisions should be made consistent with the spirit as well as the letter of the *Act*; and
  - a willingness to seek creative and innovative resolutions to issues.

The *Enhanced Mediation Pilot Project* concluded in late 2003 and, based on its success, is now the permanent way that MAG staff and IPC mediators work together to resolve appeals.

Best Practices

In evaluating the *Enhanced Mediation Pilot Project*, MAG and the IPC examined the components of a successful mediation process that were demonstrated by the successes of the pilot project.

The lessons we learned by working together in a more interactive mediation model were invaluable, and form the basis of these *Best Practices* listed below.

Best Practice #1: Commit to making the process work

- Display a willingness to participate in face-to-face mediation and/or teleconferencing with the appellant.
- Display a willingness to share information with the appellant by providing the appellant with an index of records and generally describing and discussing the records at issue with the appellant during the appeal.
- Listen with a view to understanding.
- Take advantage of the opportunity to hear the issues and interests directly from the appellant.
- Work together as partners in finding solutions rather than as adversaries.
- Move forward in a timely fashion.

Best Practice #2: Make certain the right parties are at the table

- As the Co-ordinator, you are your institution's expert on requests and appeals. If you do not have delegated decision-making authority, ensure someone who has the power to bind or who has quick access to the decision maker is present at the mediation.
- Ensure someone that is knowledgeable about the particular program area and the records at issue is present at the mediation.

Best Practice #3: Bring honed communication skills to the table

- Listen and attend.
- Seek to understand before being understood.
- Be empathetic, put yourself in the appellant's shoes.

Best Practice #4: Recognize the benefits of participating in an interactive mediation model

- See this as an opportunity to clarify issues on the spot and make sure you and the appellant are "on the same page."
- See this as an opportunity to humanize the face of government, to show that government is credible, fair, responsive and a partner in problem resolution.
- See this as an opportunity to display your creativity, flexibility and co-operation.
- See this as an opportunity to resolve disputes informally and in a timely fashion.

Best Practice #5: Shift to a culture of disclosure

- Understand that necessary exemptions from the right of access should be limited and specific, and that most exemptions are discretionary.
- Accept that decisions should be made consistent with the spirit as well as the letter of the *Act*.
- Be flexible, do not come to the table with an intractable "position."
- Be creative and open to ideas and suggestions as well as innovative possibilities for settlement.

Success stories from the pilot project

Here are just two examples of mediation successes from the pilot project. In working together to address the appellant's interests, the parties demonstrated what we believe are the Best Practices in Mediating Appeals.

Success story #1

The Ministry received a request for access to a Crown Brief from a lawyer representing a professional self-governing body that was investigating a complaint against a member. The Ministry denied access to all of the records, claiming sections 14, 19 and 21 of the *Act*.

The requester (now the appellant) appealed the Ministry's decision to deny access. In initial conversations with the Mediator, the appellant explained that the self-governing body was obligated to conduct disciplinary proceedings against the member and needed the Crown Brief to prepare. On this basis, the appellant felt that even if the exemptions cited by the Ministry might apply, the Ministry should exercise its discretion to disclose the records.

The following best practices contributed to a successfully mediated solution:

Best Practices #2: Right parties at the table and #3: Bring honed communication skills to the table

The mediator arranged a teleconference between the Assistant Co-ordinator, the Ministry's mediation representative and the appellant. Prior to the teleconference the Mediator provided the appellant with a number of relevant IPC orders.

During the teleconference the appellant expressed her frustration with the slow pace of the criminal proceedings and its impact on the governing body's ability to proceed with its own obligations. Although she had done her homework in reviewing orders, the appellant was not yet ready to concede that the exemptions applied to the records at issue. Rather, she remained of the view that the Ministry should exercise its discretion to grant access to the records.

Through the process of listening and information sharing, the parties turned the corner and began to work together in solving the problem. The Ministry was able to empathize with the appellant's interests and needs and the appellant felt listened to. Enough trust was established that the parties were able to focus on how they might best address their mutual needs. The appellant felt comfortable enough to disclose to the Ministry that the complainant had provided the appellant with copies of her two statements. The appellant then identified what particular information she required: any other statements from the complainant; a statement of the accused; police notes and will-say statements, and any factual information as to the complainant's credibility.

Best Practices #5: Shift to a culture of disclosure and #1: Commitment to making the process work

Both the Assistant Co-ordinator and the Ministry mediation representative agreed to review all of the records (approximately 400 pages plus one videotape) to determine whether the records contained any information not contained in the statements the appellant already had. In turn, the appellant agreed to review the outcome of the mediation meeting with her client and to share with them relevant orders provided by the mediator.

After the Ministry's review of the paper records, the Assistant Co-ordinator provided information relating to the review to the appellant, confirming there was no statement of the accused and no additional information of the nature she had requested.

Subsequently the Assistant Co-ordinator and the mediator independently reviewed the videotape. They agreed there was some additional information in the video and the Assistant Co-ordinator offered to meet with the appellant to generally discuss the tape. The appellant consulted with her client and decided a further meeting was unnecessary and she considered the appeal resolved.

Best Practice #4: Recognizing the benefits of participating in an interactive model

In this case, no records were ever disclosed to the appellant, yet the appellant left the table satisfied. This was due to the willingness of Ministry staff to participate in the process and look for other ways to satisfy the appellant's needs – by providing information. Trust and a good working relationship was established such that in the end, the appellant did not pursue access to the video because, by the Ministry confirming that certain information was not contained in the records, she had been provided with sufficient information to satisfy her needs. In turn, this allowed her to accept the Ministry's concerns about releasing records relating to a matter still before the courts.

Success story #2

The Ministry received a request for all records relating to an incident that the Special Investigation Unit (SIU) was called in to investigate. The Ministry issued a decision letter granting partial access to the record and denying the remaining portion, which consisted of 95 pages, one videotape and two audiocassettes, pursuant to sections 14(2)(a) and 21(3)(b).

The requester (now the appellant) appealed the Ministry's decision and the file moved to mediation.

The following best practices contributed to a successfully mediated solution.

Best Practices #1: Commitment to making the process work; #2: Having the right parties at the table and #4: Recognizing the benefits of participating in an interactive model

As the appellant was new to the FOI process, before the parties met for face-to-face mediation, the mediator spent time educating the appellant about the *Act*, IPC processes, our Web site and relevant orders. In response, the appellant was eager to embrace mediation, learn more about the FOI process and to narrow the request to the records she most wanted and might most likely obtain through a mediated solution.

The Ministry saw that the appellant had done her homework and was serious about resolving the appeal. Both parties, including the Ministry's mediation representative from the SIU, came to our face-to-face meeting committed to making the process work.

Best Practices #5: Shifting to a culture of disclosure and #3: Bringing honed communication skills to the table

The parties listened to each other's interests and needs with a view to understanding and respecting each other's perspective on the conflict. They began to see each other as partners co-operatively working together to mediate the appeal. The appellant took additional records off the table and the Ministry agreed to release certain additional records. Encouraged by these demonstrations of good will the parties put their best selves forward to resolve the appeal. The Ministry offered to search for other records they considered would be responsive to the appellant's needs. If records were located, the mediator agreed to seek consent from the relevant affected party, if she believed it was appropriate to do so. On this basis the appeal was resolved.

Although an additional record was located, the appellant was satisfied with the mediator's opinion that it was not appropriate to seek consent from the affected party and the record was not disclosed.

In the end, both parties expressed satisfaction with the mediated solution and with the mediation process.

What's next?

As a result of our successes, the IPC is changing the way we do mediation to a more interactive model involving face-to-face mediation and teleconferencing.

But how do *you* get to where we are going? Our mediators are not only experts in IPC precedents, but also in the mediation process. In their role of managing the process, they will support and guide you through these changes. But you can start right now by reading the success stories and understanding and integrating the *Best Practices* into your current routine.

We are excited about moving ahead with this revitalized mediation model and look forward to working together with all institutions to achieve a more satisfying process and many more mediation successes in the future.